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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 237

SUN SHIPBUILDING COMPANY, APPELLANT

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The findings and opinion of the Court of Claims (R. 19) are reported in 59 Ct. Cls. 757.

JURISDICTION

A judgment in this case was entered on June 9, 1924. (R. 27.) Appellant filed a motion for a new trial on June 24, 1924 (R. 27), and on October 20, 1924, the findings of fact were amended. (R. 27.) A motion for leave to file an amended motion to amend the findings was filed on October 27, 1924 (R. 27), and was overruled by the Court of Claims

on November 3, 1924. (R. 27.) The appellant made application for an appeal on December 1, 1924 (R. 27), which was allowed on December 8, 1924. (R. 28.) The appeal was taken under Section 242 of the Judicial Code (later repealed by the Act of February 13, 1925, chap. 229, 43 Stat. 936, 941).

THE QUESTION

This action was based upon a claim of five items made by appellant growing out of the construction of three vessels for the Navy Department. The first item is for the value of the use of a certain ship way in appellant's shipyard which was used in the construction of said vessels. Such vessels were constructed under a contract between the appellant and the Government. The appellant now contends that the Government required this ship way to be held open for the construction of these vessels; that there was delay by the Government in the delivery of the materials, which in turn delayed the beginning of such construction, and that after the construction was begun, the Government was guilty of other delays which increased the time that the way was occupied in the construction of these vessels to a time greater than was necessary if the Government had furnished materials, etc., promptly. It is therefore claimed that the Government is liable for the reasonable value of the use of such ship way for the period of time that the same was occupied with the construction of these

vessels in excess of the time which would have been necessary for such construction had the Government acted promptly.

The appellant contends that the actions of the Government amounted to a requisition of this particular ship way for the time in excess of that which should have been required for the construction of the vessels, and as another theory of recovery, that compensation for the use of the way during the time above stated should have been allowed as damages for breach of the contract.

The Government, on the other hand, contends that there was no requisition of any of appellant's ship ways or other facilities; that there was no breach of the contract; that the vessels were built in accordance with the contract and have been paid for, and that such disputed questions as those now raised were by the contract referred to a board appointed by the Secretary of the Navy, and that such board rejected the contentions now made by appellant, and that the decision of that board is final and conclusive.

The Government also contends that the contract provided that the final arbitrator of all disputes should be the Secretary of the Navy, and that no appeal was made to him in this case, and in the absence thereof appellant can not be heard to complain.

The appellant also makes claim for three other items which it contends should have been allowed

as part of the costs of the construction of these vessels. These items were all submitted to and rejected by the Board of Compensation. The Government contends that their conclusions are final and that since there has been no submission to the Secretary of the Navy, who, by the contract, is the final arbitrator of all disputes, the appellant can not now be heard to complain.

The appellant also claims an item of $1,500 which was reserved by the Government from payments made to appellant because of the failure to execute a final receipt and release. The Court of Claims rendered judgment for this amount, which is concededly due the appellant, and of such judgment the Government does not now complain.

STATEMENT

The facts as found by the Court of Claims are as follows:

The appellant is a Pennsylvania corporation, and at the times in question owned and operated a shipbuilding yard at Chester, Pennsylvania, comprising five similar shipbuilding ways. (R. 19.) On June 13, 1917, appellant had contracts on hand for the construction of 18 vessels of 10,000 dead-weight tons capacity each. (R. 19.) About the date of the contract four of these ship ways were occupied, but way No. 5 was unoccupied and was being held for the construction of a vessel, materials for which were on hand and were then being fabricated. (R. 19.) About that date the

Secretary of the Navy was considering the construction of 24 mine sweepers. (R. 19.) The construction of part of these by appellant was the subject of conferences between appellant and representatives of the Government. Appellant did not desire to build any of the same because of its other contracts on hand, contending that these small vessels desired by the Government could be built in other yards less suited for the construction of larger ships. (R. 19.)

On June 12, 1917, the Navy Department sent a communication to appellant which stated in part as follows (R. 19–21):

> Referring to your telegram of June 11, 1917, in reference to the construction of seagoing mine sweepers, the President hereby places with you, as an order under the provisions of the Naval Appropriation Act of March 4, 1917, the requirement that you comply with the terms of a contract, to be signed hereafter, to construct seagoing mine sweepers Nos. 22, 23, and 24.
>
> You will be paid for these vessels on the basis of actual cost plus 10% profit.
>
> * * * * *
>
> You will be responsible for workmanship and for the most expeditious prosecution possible of the work after receipt of necessary materials, and for the time of delivery, except as affected by delivery of material, and subject to the usual contract clause permitting extension of time in case of delays due to strikes or causes beyond your control.

> The responsibility for suitability of and delivery of materials, and for performance of the vessels, in so far as affect by design and materials, will rest with the Government.
>
> * * * * *
>
> The construction of these vessels in the quickest possible time is considered by the military authorities to be of the highest importance, and work on them, and the materials for them, has been assigned a place in order of relative importance with other war work equal to and parallel with torpedo boat destroyers, which gives them precedence over all other classes of naval construction, with the exception of repairs and conversion work on completed ships and work on submarine chasers. The Department trusts that you will do all in your power to expedite the completion of these vessels at the earliest possible date.

At some time during the negotiations between May 16, 1917, and June 12, 1917, with reference to the construction of these vessels, representatives of the Secretary of the Navy directed the appellant to hold its way No. 5 open for the construction of these mine sweepers. Appellant represented that if it might be permitted to go ahead with its plan for the use of way No. 5, it could make another way free in time for the mine sweepers; but the representatives of the Navy were unwilling to take any chance in this respect, and insisted on No. 5 being held for the Government's vessels. (R. 21.)

Subsequently the Secretary of the Navy forwarded to appellant for execution a contract bearing date June 13, 1917. The contract was later executed but the exact time of the execution does not appear. (R. 21.)

On June 19, 1917, appellant represented that another shipbuilding company wanted to build 4 mine sweepers, and asked authority to assign this contract, but the Navy Department refused. (R. 21.) On June 29, 1917, appellant acknowledged receipt of the Secretary's letter refusing to consent to the assignment, and stated that it was accordingly entering order for these vessels. (R. 21.) As to the contract, it said in this letter that (R. 21)—

> We have gone over your form of contract for the sweepers and believe it to be fair and reasonable in every particular, save that pertaining to the demurrage on other ships, for which we have contracts. We shall, of course, expect your department to protect us against our paying any and all demurrage accruing on these contracts due to the building of these mine sweepers.
>
> We await a formal contract from you for our execution.

The contract which was executed states in the heading that it is a contract of two parts made and concluded June 13, 1917, by and between the appellant and the United States. (R. 7.) It then provides that (R. 7, 8)—

> Whereas the Act of Congress making appropriations for the Naval Service for the

> fiscal year ending June 30, 1918, approved March 4, 1917, under the title Naval Emergency Fund, authorizes the President to construct or purchase such naval small craft as he may direct in addition to the vessels authorized in said act;

and after referring to the approved plans and specifications for mine sweepers, further provided that (R. 8)—

> Whereas the Congress having declared by joint resolution, approved April 6, 1917, that war exists between the United States and Germany, the President hereby places with the Sun Shipbuilding Company, as an order under the provisions of said act of March 4, 1917, the requirement that it comply with the contract, hereinafter set forth, to construct 3 of said vessels, complete in all respects * * *.

The contract then proceeds to state:

> Now, Therefore, This Contract Witnesseth, That, in consideration of the premises, and for and in consideration of the payments to be made as hereinafter provided, the contractor hereby covenants and agrees to and with the department as follows, that is to say: * * *.

Then follows the provisions for the building of the vessels, it being in substance arranged that the appellant should make the necessary outlays to construct and complete these vessels (R. 8), the construction of the same to conform in all respects to the drawings, plans, and specifications including

authorized changes therein. (R. 9.) The materials for such vessels were to be ordered by the Harlan & Hollingsworth Corporation, subject to the approval of the Government, for delivery direct to appellant, who should receive and pay for the same. (R. 9.) It was provided that the workmanship should be first class (R. 10), and that the vessels and materials, etc., should be kept duly insured. (R. 10.)

And then concerning the prosecution of the work, Article Seventh of the contract provided (R. 10):

> Unless prevented by strikes, the work under this contract shall be prosecuted at all times with the utmost vigor and dispatch, without interruption for any cause within the control of the contractor, and the number and class of men engaged on the contract, and the hours of work, subject to the limitations in the thirteenth clause, shall be subject to the approval and direction of the department. It is understood that the contractor proposes to extend its present plant and to add to its present facilities especially for the purpose of carrying out this contract as may be necessary, and that it is to be especially compensated therefor hereinafter provided for, but the contractor will not be required to build a dry dock capable of accommodating this vessel.

It was then provided that trials and tests should be made by appellant, and if such were satisfactory the Government should accept the vessels, condi-

tioned upon further tests, a reserve being made by the Government from the moneys due until the final tests and acceptance. (R. 10 and 11.)

Article Tenth of the contract provided that (R. 11, 12)—

> In case of the failure or omission of the contractor at any stage of the work prior to its completion, not due to strikes or any other cause or causes beyond its control, to go forward with the work and make satisfactory progress towards its completion, the department may declare this contract forfeited. In case such forfeiture shall be declared, the title to said vessel, or so much thereof as shall have been completed, and to all materials on hand applicable thereto, shall forthwith vest in the department; and the department may immediately enter the works and premises of the contractor and take possession of said vessel and materials.

It was then provided that should the Government take over the work as provided in Article Tenth, that it might proceed with the work, if it desired, at the works of the contractor or elsewhere. And further provided (R. 12):

> * * * and the contractor, on receiving notice of the intention of the department to proceed with the completion of the work, will surrender said vessel and all materials on hand, together with the use, if required, of the yard or plant, and all machinery, tools, and appliances appertaining thereto

and theretofore used, or necessarily to be used, in and about the finishing of the work.

It was further agreed in such contract that the Government should pay for the construction of the vessels, including authorized changes, actual cost plus 10% for profit. (R. 14). Cost was defined in a general way in such contract (R. 14) as including (a) the cost of labor, materials, etc.; (b), (c), and (d) proper proportions of certain overhead and general expenses; (e) proper proportions of losses from fires, flood, etc., and losses and damages resulting from displacement of or delay in work contracted for prior to the date of this contract (R. 14); and (f) (R. 14)—

> A reasonable allowance, according to the conditions, for depreciation of values of plant and property. Exceptional depreciation of extensions, increases and additions to plant and property specially acquired for or devoted to the manufacture or erection of the work or the construction of the vessel under this contract will be accounted for in payments under the item special rentals provided for in paragraphs 2 and 3 of the seventeenth clause of this contract.

For the determination of the cost as defined in the contract, Article Seventeenth of such contract provided for the creation of a "Compensation Board" to be appointed by the Secretary of the Navy. It was provided that (R. 16)—

> This board shall ascertain, estimate, and determine the actual cost in accordance with

the sixteenth clause hereof, and shall determine the proper proportions and reasonable allowances referred to therein, and the decision of said board or a majority thereof shall be binding on both parties to the contract, subject to the approval of the department.

Article Seventeenth further provided that the board (R. 16)—

> * * * will determine a fair special rental to be allowed the contractor for the use of such additional plant and equipment as must be provided for and used in the carrying out of this contract, such rental to be determined monthly, so nearly as may be to recompense the contractor nor to exceed fifty per cent of the actual cost of such additional plant and equipment, when and as the expenditures therefore are made; provided, that at the close of the contract the compensation board will then estimate, ascertain, and determine the value to the contractors of such additional plant and equipment at that time, taking account of all the circumstances, such as additional use made of said additional plant and equipment during the period of the contract, the condition of the shipbuilding business, the desirability of such equipment at that time in carrying on the business, its first cost as compared with the first cost in a normal material and labor market, its replacement value at the time when said determination is being made.

> In case the special rental that has been allowed from time to time during the period of the contract does not equal the difference between the first cost of said additional plant and equipment and the value as ascertained at the close of the contract for said additional plant and equipment, the department will pay to the contractor a sum equal to said difference. In case the special rental that has been allowed from time to time during the period of the contract is in excess of the difference between the first cost of said additional plant and equipment and the value as ascertained at the close of the contract, the department will deduct from the final payments and special reserve due the contractor a sum equal to said difference: provided, that no special rental shall be paid for any such additional plant and equipment whose installation shall not have been passed upon and approved by the compensation board.

The contract also provided that upon final completion of the contract the reserves provided for should be paid upon the execution of a final release by appellant to the Government. Article Nineteenth of the contract provided as follows (R. 17):

> If any doubts or disputes arise as to the meaning of anything in the contract, drawings, plans, or specifications, or if any discrepancy appear between said drawings, plans, or specifications and this contract, the matter shall be referred *to* at once to the Secretary of the Navy for determination; and his decision in the premises shall be

conclusive and binding upon the parties hereto: *Provided*, That both parties hereto shall have the right of appeal to the President of the United States.

Appellant gave a bond for the faithful performance of the contract. (R. 17, 18.)

Following the orders and directions of the Secretary of the Navy, appellant's way No. 5 was kept open and available for the construction of the 3 mine sweepers. The Government did not supply the material sufficient to permit the laying of the keels until October 8, 1917, and way No. 5 remained idle between June 18, 1917, and October 8, 1917, a total of 112 days. This delay was repeatedly called to the attention of the Navy Department by appellant. (R. 22.)

There were subsequent delays in the delivery of the necessary material for completion of the vessels, and way No. 5 was occupied in said work until May 30, 1918. (R. 22.) A reasonable time for the occupation of way No. 5 in the construction of the 3 mine sweepers, had the materials been promptly furnished, would have been approximately 118 days. This finding is approximate only as there was no basis for accurate determination of such time. (R. 22.) Appellant performed all of the terms of the contract to the satisfaction of the Navy Department (R. 22), and was paid $1,664,390.09, which sum did not include any compensation for certain items of a claim made to the Navy Department, which were:

1. Compensation for the use of way No. 5 for 228 days, being the alleged excess occupation because of delays of the Government.

2. Compensation in the sum of $152,000 for amortization of war facilities or special rental claimed under paragraphs 16 and 17 of the contract.

3. Reimbursement of $4,000.76 for alleged proper proportion of appellant's cost and expense for superintendents' and officers' salaries, and the additional compensation of 10% thereof aggregating $4,400.84 alleged to be provided for in paragraph 16 of the contract.

4. Compensation in the sum of $1,335.70, representing 10% of the actual payment by appellant of retroactive wages pursuant to a decision of the shipbuilding labor adjustment board; and

5. Balance of $1,500 considered to be due appellant, but withheld awaiting execution of a final release. (R. 22, 23.)

All of the above items except the $1,500 reserve were incorporated in claims by appellant presented to and considered by the Compensation Board created as provided in the contract, and were by said board rejected. (R. 23.) While the claim was pending before such Compensation Board, appellant waived all of the claims arising from delay after the material was received and construction started, and made claim only for the 112 days during which the ways were held idle before any material was delivered.

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There is no averment or evidence that the Compensation Board in considering or acting upon appellant's claim acted in bad faith or otherwise than in the exercise of an honest judgment. (R. 23.)

SUMMARY OF CONTENTIONS

The appellant contends:

1. That there was a requisition of way No. 5 of appellant's plant for a period of 112 days, prior to the laying of the first keel on October 8, 1917; and that there was a requisition of such way for an additional period of 116 days during the time which said way was occupied after the first keel was laid, which occupancy for said 116 days was due to delay by the Government in the furnishing of materials to complete the vessels. It is contended by appellant that this additional period of 116 days is an extension or a prolongation of the requisition for the 112 days.

2. Appellant further contends that even if there was no requisition of the ways, the reasonable value of the use thereof for these periods should be allowed to appellant as damages because of the alleged breach of the contract by the Government in delaying the furnishing of materials.

3. The appellant also claims that though all of the items in this suit for which it makes claim, except the one for which the Court of Claims rendered judgment and which is not disputed by the Government, were rejected by the Compensation Board, which the contract made the arbitrators of questions of cost, the action of the arbitrators was

in direct conflict with the provisions of the contract and was such a gross mistake as to imply bad faith, or at least amounts to constructive fraud, and that therefore such action is not binding.

The Government contends:

1. That there was no requisition but that the transaction here involved is a contract.

2. That the action of the Compenastion Board in rejecting these claims is final and conclusive and binding upon the parties.

3. That the contract provided that the Secretary of the Navy should be the final arbitrator of all disputes including questions of law and fact with the right to appeal to the President; that it does not appear that such remedies were pursued; and that without first resorting to these remedies, appellant has no standing in this Court and can not now be heard to complain.

4. That so far as the record now stands, the claims, even if allowable, were not proved.

ARGUMENT

I

THE TRANSACTION INVOLVED WAS NOT A REQUISITION, BUT A CONTRACT

The Navy Department determined upon the construction of these mine sweepers. On May 16, 1917, the Navy Department inquired as to the suitability of appellant's plant for the construction of these vessels. The appellant, having plenty of work on hand, did not desire to build such ves-

sels. But on June 12, 1917, the Navy Department communicated with appellant stating that the President hereby places with you (R. 20)—

> as an order under the provisions of the Naval Appropriation Act of March 4, 1917, the requirement that you comply with the terms of a contract, to be signed hereafter, to construct seagoing mine sweepers Nos. 22, 23, and 24.

The communication contained further provisions concerning the nature of the work to be done and the price to be paid therefor.

Between May 16, 1917, and June 12, 1917, way No. 5 at appellant's shipyard became vacant, and appellant was about to cause the same to be occupied with some of its commercial contract construction. The representatives of the Government, however, directed appellant to hold it way No. 5 open for the construction of the mine sweepers. Appellant represented that it would have other ways vacant in time for the construction of such mine sweepers, but the representatives of the Navy were unwilling to take any chances in this respect and insisted upon way No. 5 being held open. (R. 21.)

Subsequently the Navy Department forwarded to appellant a contract bearing date June 13, 1917. It was executed subsequent to that date, but the exact date of execution does not appear. By letter of June 29, 1917, appellant advised (R. 21):

> We have gone over your form of contract for the sweepers and believe it to be fair and reasonable in every particular, save that pertaining to the demurrage on other ships, for which we have contracts. We shall, of course, expect your department to protect us against our paying any and all demurrage accruing on these contracts due to the building of these mine sweepers.

The contract which was finally signed by appellant contained a provision which expressly provided that payments to the appellant should include (par. 16 (e), R. 14)—

> a proper proportion of a reasonable allowance for losses and damages resulting from displacement of or delay in work contracted for prior to the date of this contract caused by or contributed to or by work under emergency conditions performed by the contractor for the department.

The contract as actually executed recites the existence of the war, and states that (R. 8)—

> the President hereby places with the Sun Shipbuilding Company, as an order under the provisions of said act of March 4, 1917, the requirement that it comply with the contract, hereinafter set forth, to construct 3 of said vessels * * *.

It also provides that (R. 8)—

> Now, Therefore, This Contract Witnesseth, That, in consideration of the premises, and for and in consideration of the pay-

> ments to be made as hereinafter provided, the contractor hereby covenants and agrees to and with the department * * *.

Then follows the provisions with reference to the construction of these vessels, it being in substance agreed that the appellant would build the vessels subject to certain plans and specifications to be furnished by the Government or its agents, and the Government would pay the cost thereof plus a certain profit. The general method of ascertaining the cost was provided for in paragraph sixteenth of the contract, and as above shown it was further provided that a board should be the final arbitrator of disputes over such items of cost. Appellant gave a bond for the faithful performance of such agreement. (R. 17, 18.)

Out of the above circumstances the appellant contends that there was a requisition or a commandeering, under the Act of March 4, 1917, of appellant's way No. 5 for the period of time between June 18, 1917, and the date of the laying of the keel for the first vessel. (R. 22, 23.) Its theory is difficult to understand. The Government submits that the transaction is not a requisition or commandeering of any of appellant's property, but that it is a contract which includes the time that appellant's ways were idle before the laying of the first keel in October, 1917. Neither the communication of June 12, 1917, nor the contract dated June 13, 1917, contained the words or the intention of a requisition or a commandeering. The

Government did not seek to take anything by those documents. It merely placed an order with appellant for the construction of three vessels, just as many private concerns often place orders for the manufacture of articles or the delivery of merchandise. It is true that both the communication of June 12, 1917, and the contract itself stated that the order was placed

> as an order under the provisions of said act of March 4, 1917, the requirement that it comply with the contract hereinafter set forth * * *.

The Court of Claims considered such a clause as this, and concerning it made the following statement in the case of *Duesenberg Motors Corporation* v. *United States*, 56 Ct. Cls. 96, 101, 102 (affirmed 260 U. S. 115):

> The recital in the contract that "the President hereby places the following order with the contractor with the requirement that it comply with the contract hereinafter set forth," does not alter the fact that the contract was a voluntary one. The contractor knew, or ought to have known, that it was not in the power of the United States to compel it to enter into a contract, and that the provisions of the act cited in the contract did not confer any such power. Therefore the court in passing upon the issues presented in this case will consider the rights of the parties as being those of contractors.

An examination of the statute applicable to this question (Act of March 4, 1917, Chap. 180, 39 Stat. 1168, 1193) will show exactly what the Government did and what it intended to do. The statute provided that the Government might—

> place an order with any person for such ships or war material as the necessities of the Government, to be determined by the President, may require and which are of the nature, kind, and quantity usually produced or capable of being produced by such person. Compliance with all such orders shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts theretofore placed with such person. If any person owning, leasing, or operating any factory equipped for the building or production of ships or war material for the Navy shall refuse or fail to give to the United States such preference in the execution of such an order, or shall refuse to build, supply, furnish, or manufacture the kind, quantity, or quality of ships or war material so ordered at such reasonable price as shall be determined by the President, the President may take immediate possession of any factory of such person, or of any part thereof * * *.

In other words, the statute authorized the President to place an order with manufacturers and if that order was not accepted, to take over their plant and factory, or so much thereof as might be

needed for war purposes. If the President took over the plant or factory, clearly there would be a commandeering of property, but when the President placed an order with the statement that that order was placed under the provisions of that Act, and the manufacturer accepted the order, there was no occasion for the exercise of the power of eminent domain by the officers of the Government. The placing of this order in this case was merely a preliminary step to a commandeering of property which might have followed had the order been rejected. But the order was not rejected; on the contrary it was accepted and a formal contract thereon signed. A contract was thereby created. It is true that appellant preferred to do other work or perform other contracts. If it preferred to stand upon its legal rights, by refusing to accept and sign the contract, it should have done so. Its mere preferences in these respects will not convert the contract in a requisition. This Court decided that question in the case of *American Smelting Co.* v. *United States,* 259 U. S. 75, 78.

However, the facts in this case are even stronger than the situation just discussed. The appellant here executed a written contract expressly stating that in consideration for the agreements made by the United States, the appellant agreed to perform the work which is the subject of this controversy. Further than that, the letters or communications by appellant to the United States show that in its opinion the terms and conditions offered by the

Government were "fair and reasonable in every particular," except one not material here, but which in fact was cared for in the contract which was executed, and after that the formal contract was signed. In other words, there was a meeting of the minds of the parties. There was no forcible taking of appellant's property against its will. If there had been a requisition or a commandeering, no consent by appellant would have been necessary or even proper. An examination of the terms of the contract shows that, except for the provisions referring to the statute under which it was made and which has been heretofore discussed and explained, it was in no sense different from the ordinary contract where the parties come together and after long negotiations place their agreement in writing.

A detailed examination of the terms of the contract shows that every detail is a matter of agreement. The parties did not intend or consider the transaction as an appropriation of appellant's plant or any part thereof. This is conclusively shown by paragraph eleventh (R. 12) of the contract which gives the Government the right to take the use of appellant's shipyard, or any part thereof, to complete the vessels in the event that the appellant defaulted in the performance of the contract. An intention to appropriate the property is necessary. If the Government had intended to and had already appropriated this plant or any part thereof, there was no necessity for the provision in the contract which has just been stated.

The appellant also gave a bond (R. 17, 18) for the faithful performance of this contract. There is no power in the Government to compel appellant to execute a written contract. There is no power to compel it to do work for a 10% profit upon the cost, and there certainly is no power to compel appellant to execute a bond. All these things show that the whole transaction here involved was a contract and an agreement, and not a requisition.

The findings in this case show that some time during the negotiations preceding the execution of the written contract between May 16, 1917, and June 12, 1917, representatives of the Secretary of the Navy directed appellant to hold way No. 5 open. (R. 21.) The written contract was signed later. (R. 21.) The statute authorized the President to commandeer property. Can it be said that this request by undesignated and unidentified agents of the Navy Department at a time not definitely fixed amounts to an exercise of the power of eminent domain under this statute? The claim here is confined to time after June 18, 1917. (R. 22, 23.) The contract speaks as of its date of June 13, 1917. It was executed after all of these preliminary negotiations. All of such negotiations were merged into the contract.

II

THE ACTION OF THE COMPENSATION BOARD IN REJECTING THESE CLAIMS IS FINAL AND CONCLUSIVE

This contract provided that the Government should pay "actual cost, plus 10% for profit." (R. 14.) It further provided that so far as applicable costs as defined in Section 302 of the Revenue Act of September 8, 1916, (Chap. 463, 39 Stat. 756, 781) should control. That Act provided:

> SEC. 302. That in computing net profits under the provisions of this title, for the purpose of the tax there shall be allowed as deductions from the gross amount received or accrued for the taxable year from the sale or disposition of such articles manufactured within the United States, the following items:
>
> (a) The cost of raw materials entering into the manufacture;
>
> (b) Running expenses, including rentals, cost of repairs and maintenance, heat, power, insurance, management, salaries, and wages;
>
> (c) Interest paid within the taxable year on debts or loans contracted to meet the needs of the business, and the proceeds of which have been actually used to meet such needs;
>
> (d) Taxes of all kinds paid during the taxable year with respect to the business or property relating to the manufacture;
>
> (e) Losses actually sustained within the taxable year in connection with the

business of manufacturing such articles, including losses from fire, flood, storm, or other casualty, and not compensated for by insurance or otherwise; and

(f) A reasonable allowance according to the conditions peculiar to each concern, for amortization of the values of buildings and machinery, account being taken of the exceptional depreciation of special plants.

Article Sixteenth (R. 13, 14) of the contract provided that actual cost should include—

(a) The cost of labor and materials;

(b) A proper proportion of interest on bonds, debts, and loans;

(c) A proper proportion of running expenses including rentals, repairs, maintenance, " management, salaries, and other indirect charges ";

(d) A proper proportion of taxes;

(e) A proper proportion of losses from fire, flood, etc., and " damages resulting from displacement of or delay in work contracted for prior to the date of this contract caused by or contributed to or by work under emergency conditions performed by the contractor for the department."

(f) "A reasonable allowance, according to the conditions, for depreciation of values of plant and property. Exceptional depreciation of extensions, increases and additions to plant and property specially acquired for or devoted to the manufacture or erection of the work or the construction of the vessel under this contract will be accounted

for in payments under the item special rentals provided for in paragraphs 2 and 3 of the Seventeenth clause of this contract." (R. 14.)

Article Seventeenth of the contract provided for the creation of a Compensation Board to consist of from three to six persons, which board (R. 16)—

> shall ascertain, estimate, and determine the actual cost in accordance with the sixteenth clause hereof, and shall determine the proper proportions and reasonable allowances referred to therein, and the decision of said board or a majority thereof shall be binding on both parties to the contract, subject to the approval of the department.

Article Seventeenth also provided that the board (R. 16)—

> will determine a fair special rental to be allowed the contractor for the use of *such additional plant* and equipment as must be provided for and used in the carrying out of this contract * * *. (Italics ours.)

This article further provided that at the end of the contract the Compensation Board should determine the cost of such facilities, together with the then value of such facilities to the appellant, and if the special rental allowances made were not equal to the difference between such cost and the then value, that a further allowance of such difference should be made to the appellant; that, however, if the difference was less than the amount of such allowances for special rental, the appellant should

repay to the United States the amount which it had so been overpaid. This article also provided (R. 16)—

> that no special rental shall be paid for any such additional plant and equipment whose installation shall not have been passed upon and approved by the compensation board.

Article nineteenth provided that (R. 17)—

> If any doubts or disputes arise as to the meaning of anything in the contract * * * the matter shall be referred *to* at once to the Secretary of the Navy for determination; and his decision in the premises shall be conclusive and binding upon the parties hereto: Provided, that both parties hereto shall have the right of appeal to the President of the United States.

(a) The claim for the use of the ways

The appellant contends, first, that this item should be allowed as having been a requisition of appellant's way No. 5 for the period of time stated. We have heretofore discussed this theory and submit that it is not well founded. But the appellant further contends that even if this claim should be regarded as being covered by the contract, the Government's delay in furnishing materials with which to enable appellant to begin construction of the vessels, as well as its delay in furnishing materials after the construction began was a breach of the contract which brought about such alleged loss to appellant, and therefore because of such breach of the

contract, appellant can recover the value of the use of this way during such time.

The Government contends there was no breach of this contract. The letter from the Navy Department to the appellant which preceded the execution of the formal contract (R. 19, 20) provided that the materials would be supplied through Harlan & Hollingsworth Corporation, and the appellant would pay for the same and include such payments in the cost of the vessel to be charged to the United States. (R. 20.) It was further stated in such letter that the appellant would be responsible (R. 20)—

> for the most expeditious prosecution possible of the work *after receipt of necessary materials*, and for the time of delivery, *except as affected by delivery of material*, and subject to the usual contract clause permitting extension of time in case of delays due to strikes or causes beyond your control. The responsibility for suitability of and delivery of materials, and for performance of the vessels, in so far as affect by design and materials, will rest with the Government. (Italics ours.)

It was also stated that the materials for these vessels had been assigned a place in order of relative importance with other war work equal to and parallel with torpedo boat destroyers which gives them precedence over all other classes of naval construction, except repairs and conversion work on

completed ships, and work on submarine chasers. (R. 20, 21.) The contract itself in Article Fourth provided that (R. 9.)—

> The materials to be used in the construction of these vessels will be ordered by the Harlan & Hollingsworth Corporation, subject to the approval of the department, as aforesaid, for delivery direct to the contractor, who will receive the same and make payment direct to the individual, firm, or corporation with whom the order has been placed, * * *.

And further provided in Article Seventh that (R. 10.)—

> Unless prevented by strikes, the work under this contract shall be prosecuted at all times with the utmost vigor and dispatch, without interruption for any cause within the control of the contractor, * * *.

These are the only provisions in the letter preceding the contract or in the contract itself which have a bearing upon the time of delivery of these materials. There is nothing in any of such provisions fixing a definite time for the delivery thereof. The United States was not obligated to cause such delivery at any stated time. So far as the contract or the letter provides, the materials might be delivered at any time that the Government saw fit. Under these circumstances there was no breach by the Government concerning the delivery of materials, and in the absence of a breach appellant can not recover for such breach.

But even if we assume (which we do not concede) that the contract should be read as requiring the Government to deliver the materials either within a reasonable time or as soon as the Government might be able to make such delivery, still there can be no recovery. There is nothing in this record to show that the delivery when made by the Government was not within a reasonable time, but, on the contrary, in view of the existence of the war and the conditions generally prevailing in industries at that time, we think it is shown that the delay by the Government was not unreasonable. The correspondence proceeding the contract as well as the contract itself show that both parties anticipated that delays in delivery of materials were probable. There is also nothing in this record to show that the Government failed to deliver these materials just as soon as it was able to make such delivery. In the absence of these facts, no breach has been shown and there can be no recovery because of the breach.

The Government further contends that by paragraph seventeenth of the contract such matters as this were referred for decision by the compensation board appointed by the Secretary of the Navy, and its decision was made final and conclusive upon the parties. Such paragraph is in part as follows (R. 16)—

> For the determination of the actual cost as defined above a "compensation board" composed of not more than six nor less than

> three officers of the Navy shall be appointed by the Secretary of the Navy. This board shall ascertain, estimate, and determine the actual cost in accordance with the sixteenth clause hereof, and shall determine the proper proportions and reasonable allowances referred to therein, and the decision of said board or a majority thereof shall be binding on both parties to the contract, subject to the approval of the department.

The court below found as a fact that this item for use of the way during the period of alleged delay was presented to such board and there rejected. (R. 22, 23.) The record does not show that a proper allowance for such claim was not otherwise included in monthly allowances or even in other items in final settlement approved by the Compensation Board and paid by the Government.

It is submitted that where matters are referred to a person or group of persons designated in the contract, and their decision is by such contract made binding and final, that in the absence of fraud or bad faith, or a mistake so gross as necessarily to imply bad faith, such decision will not be subjected to the revisory powers of the court. *Kihlberg* v. *United States*, 97 U. S. 398, 402; *United States* v. *Gleason*, 175 U. S. 588, 602; *United States* v. *Mason & Hanger Company*, 260 U. S. 323, 326. The appellant, however, contends that the decision and action by the board is so directly contrary to the contract itself, that the court must say that there has been a constructive fraud and thereby disre-

gard the action by the board. The Court of Claims found that (R. 23)—

> There is no averment or evidence that the compensation board in considering and acting on plaintiff's claim acted in bad faith or otherwise than in the exercise of an honest judgment.

The Government finds no express provision of the contract which provides for the payment by the United States for the use of the ways through such period of delay, and it may be again recalled that the contract did not contemplate any certain or definite time within which the Government should deliver these materials. The materials were delivered within a reasonable time. Also reasonable allowances for this item may have been included in other allowances made by the Compensation Board. The record in this case does not show that they were not so covered. In these circumstances there is no such gross mistake as would necessarily imply bad faith. And therefore the action by the Compensation Board must be considered as final and conclusive.

Further than this, Article Nineteenth of the contract provided that (R. 17)—

> If any doubts or disputes arise as to the meaning of anything in the contract, drawings, plans, or specifications * * * the matter shall be referred *to* at once to the Secretary of the Navy for determination; and his decision in the premises shall be

> conclusive and binding upon the parties hereto: Provided, that both parties hereto shall have the right of appeal to the President of the United States.

Here is a provision by which the parties agree that the Secretary of the Navy, subject to an appeal to the President, should be the final arbitrator of questions both of law and of fact, and of all questions or disputes arising as to the meaning of anything in the contract. Such provision certainly includes the claim here made. There can be no question of the right of the parties to provide for such a final and conclusive arbitration of all questions and disputes. The record in this case fails to show that appellant ever availed itself of this method of a decision of such question, and it is submitted that in the absence thereof appellant can not now be heard to complain. This Court, so far as we are able to ascertain, has never spoken upon such question except that an excerpt from the decision in the case of *Ripley* v. *United States*, 223 U. S. 695 at 702, may be said to recognize the correctness of the Government's contention. The Court there said:

> The defendant claims that the plaintiff lost his right to recover because he failed to appeal to the Engineer in Charge, at Galveston, or to the Chief of Engineers, in Washington. But there was no requirement or provision for appeal in the contract. The clause relied on by the Government relates to the duty of inspection and acceptance,

> making the decision of the Engineer in Charge conclusive as to the quality and quantity of work and material. That part of the agreement had no reference to the settlement of the core. Whether it had sufficiently consolidated involved the determination of a matter of fact, varying from day to day. The contractor had to act or refrain from acting when the decision was made. That matter was expressly left to " the judgment of the United States agent in charge." The contractor in submitting to his decision did not lose his right to recover damages occasioned by the refusal to permit the crest blocks to be laid, when, as found by the court, this refusal was gross error and an act of bad faith.

The Court of Claims has squarely decided this question in the recent case of *Converse et al* v. *United States,* C. Cls. C–1202, decided February 15, 1926, and not yet reported in bound volumes. In that case there was a provision in the contract to the effect that the Government by its officer in charge should at all times exercise full supervision and direction of the work, and that—

> all questions, disputes, or differences as to any part or detail thereof shall be decided by such officer in charge. * * *

The Court of Claims there said:

> The claims of the plaintiffs arose largely from the differences between them and the United States as to the space, spur track, and labor situation. The plaintiffs had the

> right to invoke this clause of the contract. They did not do so, and having failed to avail themselves of the remedy accorded to them by the provisions of the contract it is too late now to appeal to the court for redress. Parties must abide by their contracts. The court will enforce the provisions of contracts and can not take into consideration questions of hardships entailed upon parties who by their own acts have precluded themselves from relief in the courts.

It is submitted that the holding of the Court of Claims is sound and should be applied in this case.

For the reasons above set forth, it is submitted that appellant should not recover upon its claim for the value of the use of the ways which it claims was caused by the delay of the Government in furnishing materials.

(b) The claim for $152,000 for amortization of war facilities and special rental

In its petition appellant alleges this claim as "an item for amortization or depreciation of values of plant and property described in said order or contract, amounting to $95,773.75." (R. 6.) However, the Court of Claims in its findings states the claim as (R. 23)—

> Compensation in the sum of $152,000 for amortization of war facilities or special rental which it is alleged is provided for in paragraph 1 (f) of the sixteenth clause and paragraphs 2 and 3 of the seventeenth clause of the contract of June 13, 1917.

In its brief in this case appellant states that its claim is for depreciation and amortization of its facilities under paragraph sixteenth, and that it is not a claim for special facilities under paragraph seventeenth. It is submitted that the statement by the Court of Claims in its findings of fact after the hearing of evidence must govern and control as to what is the nature of appellant's claim. The Court of Claims, as above shown, has in its findings of fact expressly stated that it is for special and war facilities. Article Sixteenth of the contract provided for the payment of cost plus a profit and stated that cost should include (f) a reasonable allowance, according to the conditions for depreciation of values of plant and property. (R. 14.) It also provided that exceptional depreciation for plant specially acquired for the purposes of the contract should be cared for as provided for in Article Seventeenth of the contract. (R. 14.)

Article Seventeenth of the contract provided for the appointment of the Compensation Board, as has been heretofore set out, and stated that the board (R. 16)—

> will determine a fair special rental to be allowed the contractor for the use of *such additional plant and equipment* as must be provided for and used in the carrying out of this contract * * *. (Italics ours.)

It further provided that at the end of the contract the board should determine the then value of these additional facilities, considering many things,

such as the appellant's business, the condition of the industry, etc.; and that from the difference between the original cost and the then value they should deduct the allowances which had theretofore been paid for special rental for such special facilities, and if there was any difference that the Government should pay to the appellant such difference, or if the appellant had been overpaid by way of such special rental, the appellant should in turn reimburse the Government. This article closed with the following (R. 16):

> Provided, that no special rental shall be paid for any such additional plant and equipment whose installation shall not have been passed upon and approved by the compensation board.

As has been heretofore shown, the Compensation Board was to pass upon and decide these items of cost; and their decision by the contract was made final and binding. (R. 16.) The court below found as a fact that this item was submitted to the Compensation Board and by it rejected. (R. 23.) We have heretofore shown in connection with the discussion of item (a) that the decision of this board in the absence of bad faith, or such gross mistake as to imply bad faith, is binding and conclusive. That board may have rejected the claim for any one of the following reasons:

(1) That there were no special facilities furnished;

(2) If any such were furnished, the cost at the time of construction, which was about June, 1917, the date of the contract, was less than the value in May, 1918, the date of the launching of the last vessel;

(3) If it was a claim for depreciation of ordinary facilities, the board may have held that there was in fact no such depreciation; or

(4) If there was any such depreciation, due allowance had been made in other items;

(5) If it is a claim for special facilities, there is no showing in this record that the same were ever approved by the Compensation Board before they were installed, and the contract expressly makes that a condition precedent to any payment by the Government for such facilities.

The record shows nothing concerning these questions. The record does not show that, in fact, any loss was actually suffered by appellant either because of depreciation in ordinary facilities or because of alleged loss on special facilities. On such a record this Court will not say that the action of the Compensation Board was either in bad faith or so grossly erroneous as to imply bad faith. Their finding is final and conclusive and should stand. The parties have agreed to this.

The record does not show that this item of the claim was ever presented by appellant to the Secretary of the Navy or to the President of the United States, who, by paragraph nineteenth of the contract (R. 17), were made final arbitrators as

to any doubts or disputes as to the meaning of anything in the contract, and their decision was to be final and conclusive. For this reason, as heretofore discussed in connection with item (a), we submit that because of appellant's failure to avail itself of such remedies it can not now be heard to complain in the courts.

(c) Reimbursement for the sum of $4,000.76 for the alleged proper portion of appellant's cost and expense for superintendents' and officers' salaries, together with a 10% profit thereon

Paragraph sixteenth of the contract provides as an item of cost that should be allowed (R. 14)—

> (c) A proper proportion of running expenses, including * * * management, salaries, and other indirect charges.

It is assumed that this item is claimed under the above quoted provisions of the contract. This claim was also submitted to and rejected by the Compensation Board. (R. 23.) The record does not show—

1. That such sum was in fact spent;
2. That if spent, it was necessary;
3. That the Government had not already paid a proper proportion of such expense in other allowances.

Can it be said in the absence of these or other facts which might be suggested, that the action of the Compensation Board was so grossly erroneous or mistaken as to imply bad faith?

It is submitted for the reasons heretofore stated in discussing the other items that the action of the Compensation Board in rejecting this item was final and conclusive, and not subject to reveiw by this Court.

The record does not show that this item was ever presented to the Secretary of the Navy or to the President, who were arbitrators of all questions or disputes concerning the contract, and whose decision by the contract was made final and conclusive. For the reasons which have been heretofore discussed in connection with the other items, because of appellant's failure to avail itself of this remedy provided in the contract, the appellant can not now be heard to complain in the courts.

(d) Compensation in the sum of $1,335.70 representing 10% of the actual cost in the payment by appellant of retroactive wages pursuant to a decision of the Shipbuilding Labor Adjustment Board

The contract provides for the payment of cost plus a 10% profit. (R. 14.) The payment of wages is certainly a part of the cost, and is expressly made so by Section (a) of paragraph sixteenth, which in enumerating the items of cost states "(a) the cost of labor * * *." (R. 14.) The record, however, does not show that appellant in fact ever paid any of the amounts upon which it now claims a profit. It does not show but what, if the same were

paid by appellant, they were improperly paid and should not have been charged as a part of the cost of the contract. Appellant may have made such improper payments through erroneous calculations, improper construction of the ruling of the Shipbuilding Labor Board, or for a variety of other reasons which may be suggested. The labor may not have been necessary for the building of the ship. The Government may have cared for this item if proper in other allowances. None of these matters are shown in the record. In their absence the courts will not say that the action of the Compensation Board, to whom decision upon such questions has been referred, is so erroneous or grossly mistaken as to imply bad faith. And in the absence of such a holding, the action by the Compensation Board in rejecting this item of the claim (R. 23) is final and conclusive.

It is not shown that this item of the claim was ever presented to the Secretary of the Navy or to the President of the United States who, by the contract, were made the final arbitrators of questions and disputes concerning the contract. Because of appellant's failure to avail itself of this remedy, it can not now be heard to complain in the courts. For these reasons this item of appellant's claim must be denied.

III

THE APPELLANT HAS FAILED TO PROVE THE ITEMS OF ITS CLAIM. THE FINDINGS OF THE COURT BELOW DO NOT CONTAIN ANY FACTS WHICH SHOW THAT THE APPELLANT LOST OR SUFFERED THE ITEMS FOR WHICH IT NOW MAKES CLAIM

As to item (a), the value of the use of ways during the period of time which it is contended the Government delayed in the delivery of materials, there are no facts which show the exact number of days that resulted from such delay. The court stated that the time which it fixed in its finding was approximate only, and that it was no basis for accurate determination. (R. 22.) The reasonable value of the use during any time does not appear in the record.

As to item (b), which is the claim for depreciation of facilities, there is no showing in the record that there was any depreciation, nor the amount thereof, if such depreciation in fact existed.

As to item (c), which is the claim for reimbursement for salaries of superintendents and managers, there is no showing in the record that any such expenditures were in fact made, nor the amount thereof, if they existed.

As to item (d), which is for a profit upon wages alleged to have been paid because of the retroactive character of a ruling of the Shipbuilding Labor Board, there is no finding that such wages

were actuallly paid; nor if paid as to the amount thereof.

It is submitted that even if appellant's claims were otherwise valid, they have not been sustained by evidence, and therefore the decision by the court below should be affirmed.

CONCLUSION

For the reasons heretofore stated, it is respectfully submitted that the decision of the Court of Claims should be affirmed.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.
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MARCH, 1926.

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